HARUN TAIB

v.

KHOR PENG SONG

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 22-147-90]
30 MAY 1991

CONTRACT: *Sale of land - Option - Consideration stated in agreement not actual price - 'Concealed money' - Defrauding government of revenue - Opposed to public policy - Void and unenforceable - Contracts Act 1950, s. 24(b), (e) - Stamp Act 1949, s. 61(a).*

The said land which was the subject of this dispute, was sold on 15 August 1990 by the defendant K to a company AC for RM333,000. However, the plaintiff H claimed that the said land had been sold to him two days earlier on 13 August 1990 for RM479,000, inclusive of RM149,000 which was termed as 'concealed money'. H claimed that K had given an option on 5 August 1990 to C; further that he purchased the land from one L who was the representative of C and K.

The purchase price stated in the unexecuted sale and purchase agreement was RM333,000, the unstated sum of RM149,000 was supposedly concealed money. The 10% deposit was alleged to have been paid on 13 August 1990 and the sale and purchase agreement was to be signed by K and H on 15 August 1990. H contended that what remained to be agreed upon between the parties was the date on which the concealed money was to be paid. H stated that on the night of 13 August 1990 he was advised of the cancellation of the contract as a result of which he lodged a caveat on the land on 15 August 1990.

K denied all H's allegations, stating that being an illiterate, he could not have given the option (which was supposedly written in Chinese characters). He denied any knowledge of C or L.

H claimed specific performance of the sale and purchase agreement.

Held:

[1] The insertion of a false figure in the sale and purchase agreement for the consideration was intended and calculated to mislead the stamp duty authority and would have resulted in the evasion of the payment of a higher duty which was a breach of s. 61(a) of the Stamp Act 1949; the Court has to regard that as being opposed to public policy within the meaning of s. 24(e) of the Contracts Act.

[2] If the prayer for specific performance was allowed, it would have fallen within what is void under s. 24(b) of the Contracts Act 1950 as the performance of the contract if permitted would contravene s. 61(a) of the Stamp Act 1949. The agreement was therefore void and unenforceable.

[3] H was not frank about his dealings in this particular case. He did not disclose to the Court in an earlier application for an injunction the actual consideration agreed for the land and he had instructed a false amount for the consideration to be inserted in the sale and purchase agreement. Nor was there evidence to show that the option holder C could act as agent to sell the property on behalf of K. The evidence did not show any option - neither was there any evidence adduced to show that C was K's servant or agent. Furthermore, neither C nor L gave evidence, they being the best persons to have testified as to the evidence of the option or that they were K's agent.

[4] K on the other hand was a straightforward witness and his defence was believable on a balance of probabilities. It is improbable that K would have wanted to sell his land for RM333,000 to a company, if H's allegations as to an earlier sale of RM479,000 were true.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Alexander v. Rayson [1936] 1 KB 169 ***(foll)***
Napier v. National Business Agency [1951] 2 All ER 264 ***(foll)***
Tan Chee Hoe & Anor. v. Ram Jethmal Punjabi [1983] CLJ (Rep) 1022 ***(cit)***

Legislation referred to:
Contracts Act 1950, s. 24(b), (e)
Stamp Act 1949, ss. 5, 61(a)

For the Plaintiff - Cynthia Lee; M/s. Gan Teik Chee & Hoe
For the Defendant - Bala Mahesan; M/s. Bala Mahesan & Co.

JUDGMENT

KC Vohrah J:

On 15 August 1990, the defendant, who was the sole registered owner of a piece of land, lot 278, held under and comprised in SPK 2264, Mukim Kuah, Kedah, sold the said land to a company, Ara Corporation (M) Sdn. Bhd. for RM333,000.

The plaintiff, however, claimed that the said land had been sold to him earlier, 2 days earlier, on 13 August 1990, for an agreed price (and it certainly was at a much higher price) of RM479,000 inclusive of a sum of RM149,000 which the plaintiff called "wang gelap" or "concealed money".

The plaintiff in his pleadings stated that the defendant gave an option dated 5 August 1990 to one Chew Kok Keng and appointed him as his servant and/or agent to sell the said land. The defendant, in his defence, denied both these two assertions.

The evidence adduced on behalf of the plaintiff showed that on 13 August 1990 the plaintiff went to the office of the plaintiff's solicitor, PW1, with one Lim Chai Woo and another person after having come to an agreement with him to buy the said land.

According to the plaintiff and PW1 this man, Lim Chai Woo, stated that he represented one Chew Kok Keng who had an "option" from the defendant. PW1 said that Lim Chai Woo also claimed to be the representative of the defendant.

The evidence was that Lim Chai Woo then produced a document written in Chinese characters and that he stated that it was the "option" given to Chew by the defendant in respect of the land. Neither the plaintiff nor PW1 can read Chinese characters but both nevertheless stated that it was an "option" given by the defendant to Chew.

The evidence was also that Lim Chai Woo produced a photocopy of the identity card of the defendant, a photocopy of the document of title in respect of the subject property and photo copies of receipts in respect of certain dues paid to the government in respect of "Hasil Tanah, Tali Ayer dan Pelayaran" for the years 1988, 1989 and 1990.

As regards the price for the land, PW1 testified that at the office the parties wanted the price of the land at RM330,000 in the sale and purchase agreement and that in addition there was "to be concealed money" in respect of which the solicitor, PW1, said, "I told them I could not take into account".

According to PW1 it was agreed that 10% of RM330,000 was to be paid on 15 August 1990 at which date the sale and purchase agreement was to be signed. Another term was that the balance of the purchase price was to be paid 6 months later. And it was agreed between the plaintiff and him that the written sale and purchase agreement would be signed by the plaintiff and the defendant on 15 August 1990 at 12 noon.

PW1 said that what remained to be agreed upon between the parties in his office was the date on which the "concealed money" should be paid; the plaintiff suggested payment at the date of completion of sale while Lim Chai Woo wanted it earlier. Lim, according to the evidence of the plaintiff and PW1, said he had to confirm with Chew Kok Keng when it was to be paid. Lim made a phone call and spoke to a person who he claimed was Chew Kok Keng. The plaintiff who did not know Chew Kok Keng also spoke to this man and it was agreed that the concealed money was to be paid 6 months from the date of the signing of the sale and purchase agreement.

More about the "concealed money". The plaintiff said that the cost of the said land (which was 33 relongs 145 jemba) was RM14,500 per relong and the total cost that was agreed upon was RM479,000. The evidence was that the plaintiff instructed PW1 to show in the agreement that the consideration was RM330,000 instead of RM479,000. The plaintiff said that Lim Chai Woo had asked for it. And according to PW1, Lim Chai Woo told him that the vendor (that is, the defendant) "wanted it this way because if the consideration is more he would have to distribute it to his father, his brothers and sister but if the consideration is stated to be a lower sum from the actual price he would distribute less."

I pause here to note, with considerable disquiet, that in the pleadings the consideration for the land was pleaded at RM330,000 not RM479,000 and that in the affidavit that the plaintiff affirmed for use in the interlocutory application for an injunction against the defendant (this was brought out at the trial) he did not disclose the fact of the concealed money.

Back again to the office of PW1. According to PW1 about 20 to 30 minutes after the parties had left his office he received a call from "a person claiming to be Lim Chai Woo" and he was asked to cancel the agreement and that night the plaintiff was informed of the cancellation.

The plaintiff registered a caveat on the land on 15 August 1990. On that date too the plaintiff waited for the defendant to appear at the office of PW1 to no avail. According to the plaintiff, he, at the office of PW1, at about 4 p.m. tried to contact the defendant at his home in Kulim but was told by a woman that the defendant had gone to Penang and would be back in a little while. And he phoned again at about 5.15 p.m. and he said he spoke to the defendant and the defendant told him that he had sold the land that day and apparently when told that he (the plaintiff) had brought the deposit of RM33,000 the defendant said he would speak with Chew Kok Keng. He also said that the defendant confirmed that he had given an option to Chew Kok Keng and that Chew Kok Keng had given it to Lim Chai Woo. The plaintiff also said he passed the phone to PW1 and PW1 then spoke to the man in Chinese. PW1 said the man, purportedly the defendant, confirmed that he gave an option to Chew Kok Keng.

The defendant in his pleadings and evidence categorically denied giving any "option" to Chew Kok Keng; and he also denied appointing him as agent for the sale of the land. He, an illiterate, denied giving any paper written in Chinese characters authorising a person to find him a buyer for his land. In his evidence the defendant said that he did request 5 to 6 persons to find buyers for the said land. His unchallenged evidence was that this was the

only land that he owned and which land he did not share with anybody. And he said he supplied copies of his identity card, the document of title and quit rent receipts to some of these persons; but these persons did not include Chew Kok Keng or Lim Chai Woo, both of whom, he said, he did not know prior to his sale of the land to Ara Corpn. (Sdn.) Bhd. And he said that if a person had found an interested buyer the broker and the interested buyer had to talk to him and he said that on 14 May 1990 one Osman brought a "Datin" to his house to purchase the land and he agreed to sell the land for RM333,000; they agreed to meet at a solicitor's office the next day and he met the Datin the next day at the solicitor's office and the transaction went through.

As regards the telephone call which the plaintiff made to the defendant on 15 August 1990 the defendant denied that the plaintiff or anybody else spoke to him over the phone that day as regards that said land.

The "Concealed Money"

Before I proceed further let me deal with the matter of the "concealed money". The plaintiff admitted that he instructed his solicitor, PW1, to reflect only RM330,000 as consideration for the land in the sale and purchase agreement when the price he agreed to pay was actually RM497,000. This was duly done as is shown in P7. It is clear, assuming there was a valid contract entered into, that if the written instrument had gone for stamping, stamp duty would have been paid on the consideration of RM330,000 shown in the document, not on the full amount of RM479,000, the actual consideration for the land. The Government of Malaysia would have been defrauded of revenue to the extent of the stamp duty that would have been payable on the amount which is the difference between the actual price and the price shown in the agreement (about 37% of the actual consideration). The plaintiff knowingly misrepresented the price in the sale and purchase agreement that he instructed PW1 to draw up and he cannot deny that the Government of Malaysia would have been defrauded of revenue if the instrument had been sent for stamping.

Section 5 of the Stamp Act 1949 (Act 378), *inter alia*, provides that all the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty with which any instrument is chargeable are to be fully and truly set forth in the instrument. Section 61(a) of that Act states that any person who with intention to evade the payment of duty executes any instrument in which all the facts and circumstances are not truly and fully set forth as required by s. 5 shall be liable to a fine not exceeding two thousand five hundred ringgit. True, here the instrument had not been executed and presented for stamping so no offence under s. 61(a) of the Act has been made out. But the plaintiff had himself claimed he had concluded a contract and that he had instructed the solicitor to draw up the sale and purchase agreement and to incorporate all terms including the false consideration in the agreement; he caused an overt act to be done and he prayed to the Court for specific performance of the agreement.

If I had allowed the prayer that would have fallen within what is void under s. 24(b) of the Contracts Act 1950 as the performance of the contract if permitted would contravene s. 61(a) of the Stamp Act.

Section 24 of the Contracts Act reads:

> The consideration or object of an agreement is lawful, unless:
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> a. it is forbidden by a law;
> b. it is of such a nature that, if permitted, it would defeat any law;
> c. it is fraudulent;

d. it involves or implies injury to the person or property of another; or
e. the Court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

On the other hand, bearing in mind *Alexander v. Rayson* [1936] 1 KB 169 and *Napier v. National Business Agency* [1951] 2 All ER 264 touching on the refusal to enforce contracts intended to mislead revenue authorities as being opposed to public policy my view is that the insertion of a false figure for the consideration was intended and calculated to mislead the stamp duty authority and resulted in the evasion of the payment of a higher duty; and the Court has to regard that as being opposed to public policy within the meaning of s. 24(e) of the Contracts Act. And that makes the agreement void too and unenforceable.

The Option

I now come to the matter of the "option". The plaintiff pleaded vaguely that the defendant gave an option dated 5 August 1990 to one Chew Kok Keng and that by the said option the defendant appointed Chew Kok Keng as his servant and/or agent to sell the land.

But the evidence did not show any option. PW1 said Lim Chai Woo claimed he was the representative of the defendant but PW1 also said that when he asked Lim Chai Woo what authority he had to represent the vendor, Lim "produced a piece of paper which he said was an option given by the vendor to one person by the name of Chew Kok Keng ..." This was the document which was written in Chinese characters which was mentioned earlier, a document which PW1 could not read. And this document was not produced in Court.

What was the option all about? The plaintiff himself too, who could not read the document, testified about the document being an option in the name of Chew Kok Keng. Interestingly, no evidence was adduced as to what the "option" was all about; and the option document was only referred to fleetingly. No evidence, too, was adduced to show that the option was also given to a nominee of the option holder (for an example of an option given to a nominee as well, see *Tan Chee Hoe & Anor. v. Ram Jethmal Punjabi* [1983] CLJ (Rep) 1022). There was also no evidence that the plaintiff purportedly bought the said land as nominee of a purported "option holder" Chew Kok Keng. If Chew Kok Keng was the option holder there is no evidence that, in exercise of the option, he bought the land. If the defendant had refused to honour the option then it was for Chew Kok Keng as option holder to sue the defendant on the option. How then was the plaintiff in the picture in this case? It was not pleaded that the option provided for a nominee of the option holder to buy the land and, as earlier stated, in any event no evidence was produced to that effect.

There was also the contradictory plea that Chew Kok Keng acted as agent of the defendant. While PW1 stated that Lim Chai Woo claimed to be both the defendant's and Chew Kok Keng's agent, no evidence was adduced to show that Chew Kok Keng was the servant or agent of the defendant.

Neither the purported option holder Chew Kok Keng nor Lim Chai Woo, the person who claimed to be "representative" of the defendant and Chew Kok Keng, appeared in Court to give evidence in Court that it was the defendant who gave the "option" whatever it was and to produce the option document. Lim Chai Woo was the best person to testify that he indeed acted for Chew Kok Keng and that he had confirmed with him on the phone the terms he had agreed with the plaintiff. Plaintiff's Counsel at the trial said that these two persons were in the "defendant's camp" but no evidence at all was produced to show that.

The plaintiff's Counsel had referred to affidavits affirmed by the plaintiff and by Lim Chai Woo which were used in an interlocutory application in the case. She argued these affidavits showed that Lim Chai Woo and Chew Kok Keng were in the "defendant's camp". Bearing in mind O. 38 r. 1 the point is that the plaintiff himself did not give oral evidence to that effect nor did he did read or refer to his own affidavit. And as for the affidavit of Lim Chai Woo, I could not see how the affidavit filed in respect of an interlocutory proceeding may be used for the purposes of a trial when, he, the maker of the statement in the affidavit, was not in Court to testify to such statement.

Only Chew Kok Keng - and this was the man that the plaintiff had never met - the plaintiff had merely talked to someone over the telephone who Lim Chai Woo claimed was Chew Kok Keng - could have testified that the defendant indeed gave him an "option" or that he was the agent of the defendant. Chew's evidence was vital to prove the plaintiff's claim that the defendant gave an option to him and/or that the defendant appointed him as agent to sell the land. The option was not produced. And Chew did not give evidence on the plaintiff's behalf and I drew the inference that had he testified the evidence would have been unfavourable to the plaintiff.

Lim Chai Woo could have confirmed that he did have the written option, that he negotiated on behalf of Chew Kok Keng and that the person who he claimed was Chew Kok Keng and with whom the plaintiff confirmed the terms of the purchase of the property was indeed Chew Kok Keng. Lim Chai Woo did not give evidence and I drew the inference that had he testified the evidence would have been unfavourable to the plaintiff.

In my view the plaintiff was not frank about his dealings in this particular case and about the shadowy *dramatis personae* who purportedly acted for the defendant and who failed to give evidence on his behalf. He admitted not disclosing to the Court in an earlier application for an injunction the actual consideration agreed for the land. He instructed a false amount for the consideration to be written into the sale and purchase agreement and the pleadings for his statement of claim also misrepresented the consideration. Under cross-examination he reluctantly admitted having a debt over a piece of property registered under his name which was intended to be sold by public auction. But he said the property was not his. He explained under re-examination, "... they used my name as I am a bumiputra. They wanted to use my name to secure the loan ..." The plaintiff can hardly be considered as a creditworthy witness. I am not at all convinced that he spoke to Chew Kok Keng over the phone as claimed. PW1 claimed he spoke to the defendant when the plaintiff passed the phone to him but he did not know the defendant. Did he really speak to the defendant? The defendant flatly denied he spoke to the plaintiff or anybody else. I have my doubts that the plaintiff spoke to the defendant as claimed and my doubts that the person that PW1 spoke to was the defendant.

Even if one can believe the story of the plaintiff that the plaintiff confirmed to him over the phone on the 15th that he gave to Chew Kok Keng the option and that Chew Kok Keng had given it to Lim Chai Woo that was not evidence that there was a term that the land could be purchased by Chew Kok Keng or that it could be purchased by a person nominated by Chew. Nor was there evidence to show that there was a term in the option that the option holder Chew Kok Keng could act as agent to sell the property on behalf of the defendant.

In my view the defendant was a straightforward witness. His defence was believable on a balance of probabilities. There was no option given by him to anybody. He did not know Chew Kok Keng nor Lim Chai Woo until he had sold his land to the company; he did not appoint anyone to be his agent to sell his land.

And I found it improbable that the defendant would want to sell his land for RM333,000 and in fact he did sell it for that amount to a company, when the sale price concluded earlier was RM479,000! And the evidence adduced on behalf of the plaintiff was to that effect, and the Court was supposed to believe, that he knew of the concealed money - he wanted the extra money concealed so that he would not need to share the concealed money with his relatives!

For all the foregoing reasons I could not find for the plaintiff and I dismissed his claim with costs. And I ordered the caveat lodged by the plaintiff in the land to be withdrawn and for damages to be assessed by the Senior Assistant Registrar.

Also found at [1991] 3 CLJ 2484